UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:01CR173DJS(MLM)
	)	
DERON EUGENE HENDRIX,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court on the motions of the parties. Pretrial matters were referred to the undersigned United States Magistrate Judge under 28 U.S.C. §636(b). An evidentiary hearing with regard to defendant Hendrix's pretrial motions was held on July 20, 2001 .[1] This case is set for trial on September 17, 2001.

At the hearing on July 20, 2001, defendant was present in person and represented by counsel, Ms. Deborah Van Arink. The government was represented by Assistant United States Attorney Antoinette Decker. Prior to the presentation of evidence, the government informed the court that there were no out of court identifications of defendant Hendrix. Therefore, defendant Hendrix's **Motion to Suppress Identification** should be denied as moot. [182] The government further stated that it would produce to defendant all promises of immunity, leniency or preferential treatment made by the government during this case. Therefore, defendant Hendrix's **Motion to Compel Disclosure of Existence and Substantial Promises of Immunity, Leniency or Preferential**

[1] A separate hearing regarding Title III wiretaps concerning defendant Hendrix was held on May 24, 2001. Defendant's Motion to Suppress the Contents of Any Electronic Surveillance [180] was discussed in a separate Report and Recommendation dated August 23, 2001. The undersigned previously denied other non-dispositive motions filed by defendant Hendrix.

Treatment will be denied as moot. [183] The government also said that after the offers of leniency are disclosed, defendant may indicate those witnesses defendant wishes to interview and they will be made available for interview. Therefore, defendant Hendrix's **Motion to Interview Prospective Government Witnesses** will be denied as moot. [184]

1. Defendant Hendrix's Motion for Severance from Co-defendants at Trial [185]

Defendant has moved for severance of defendants pursuant to Rules 8(d) and 14 of the Federal Rules of Criminal Procedure. In determining whether a defendant is entitled to a separate trial, the court must decide whether joinder was proper under Rule 8 and whether joinder is likely to have a "substantial and injurious effect or influence in determining the jury's verdict." United States v. Lane, 474 U.S. 438, 449 (1986), quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).

Joinder under Rule 8(b) requires that there be a factual interrelationship among all the joined defendants and counts. E.g., United States v. Bledsoe, 674 F.2d 647, 656-57 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). In determining before trial whether or not joinder was proper, the court must see whether this factual interrelationship is alleged in the Indictment. Id. at 655; United States v. Andrade, 788 F.2d 521, 529 (8th Cir.), cert. denied, 479 U.S. 963 (1986); see also United States v. Jones, 880 F.2d 55, 62-63 (8th Cir. 1989). In this case, the actions of the defendants are factually interrelated. The Indictment alleges in Count I a conspiracy between and among the fourteen named defendants to knowingly and intentionally possess with intent to distribute crack cocaine and cocaine. Count II alleges a specific instance on which defendant Hendrix possessed with intent to distribute cocaine and Count III alleges a specific instance on which defendant Hendrix possessed with intent to distribute crack cocaine. Count VI alleges another specific instance on which defendant Hendrix possessed with intent to distribute cocaine. Other Counts allege specific

instances of possession with intent to distribute by the other defendants. It is apparent on the face of the Indictment that joinder is proper.

"When defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." Zafiro v. United States, 506 U.S. 534, 539 (1983). "There is a preference in the federal system for joint trials of defendants who are indicted together." Zafiro, 506 U.S. at 537; United States v. Shivers, 66 F.3d 938, 939 (8th Cir.), cert. denied, 116 S.Ct. 581 (1995). Joint trials are favored because they "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." United States v. Lane, 474 U.S. at 449, quoting Bruton v. United States, 391 U.S. 123, 134 (1968); United States v. Cadwell, 864 F.2d 71, 73-74 (8th Cir. 1988). The court must look to the defendant's showing that prejudice would result from joinder and consider whether such prejudice can be avoided at trial. Very often relevant factors cannot be fully evaluated until during trial, e.g., the effect of limiting instructions, the strength of the government's evidence, the receipt of evidence not relevant to all defendants on all counts, and the number of defendants tried jointly. United States v. Sazenski, 833 F.2d 741, 745-46 (8th Cir. 1987), cert. denied, 485 U.S. 906 (1988).

"Rarely, if ever will it be improper for co-conspirators to be tried together." United States v. Stephenson, 924 F.2d 753, 761 (8th Cir.), cert. denied, 112 S.Ct. 63 (1991); United States v. Drew, 894 F.2d 965, 968 (8th Cir.), cert. denied, 494 U.S. 1089 (1990).

"It is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Zafiro, 506 U.S. at 540. See also Layton v. South Dakota, 918 F.2d 739, 744 (8th Cir. 1990), cert. denied, 499 U.S. 953 (1991). Likewise, severance is not required: If the evidence against a co-defendant is more damaging, United States v. Pou, 953

F.2d 363, 369 (8th Cir.), cert. denied, 112 S.Ct. 1982 (1992); if the defendant's role in a conspiracy is minor, United States v. Pecina, 956 F.2d 186, 188 (1992); or if all of the evidence will not be admissible against all co-defendants, United States v. Sparks, 949 F.2d 1023, 1027 (8th Cir. 1991), cert. denied, 112 S.Ct. 1987 (1992).

"The mere fact that there is hostility among the defendants or one defendant may try to save himself at the expense of another is not sufficient grounds to require separate trials." United States v. Garret, 961 F.2d 743, 746 (8th Cir. 1992). "Mutually antagonistic defenses are not prejudicial per se." Zafiro, 506 U.S. at 538.

Anticipated exculpatory testimony of a co-defendant does not automatically require severance. United States v. Foote, 920 F.2d 1395, 1400 (8th Cir. 1990), cert. denied, 111 S.Ct. 2246 (1991). "Severance is not mandated simply because a co-defendant might testify and thereby only 'increase the chances of acquittal or tend to rebut some aspect of the government's case.' Exculpation is required." Foote, 920 F.2d at 1400 (quoting United States v. Reed, 733 F.2d 492, 508 (8th Cir. 1984)).

A joint trial would not deprive defendant of his right to ten peremptory jury challenges. Defendant has no such unqualified right. Rule 24(b) of the Federal Rules of Criminal Procedure states that "the defendant or defendants jointly [are entitled] to ten peremptory challenges." (emphasis added) In addition, the evidence in this case is not complex or confusing such that the jury will be unable to make a determination about the separate guilt of each defendant.

Severance is not required on the ground that the testimony of a co-defendant at trial would compel defendant to testify or to suffer prejudice as a result of a decision not to testify. An instruction cautioning the jury against drawing any adverse inference from his election not to testify

will protect the defendant from any prejudice anticipated by the co-defendant's testimony. In addition, no comment concerning the failure of any defendant to testify is permitted.

Some factors will require pretrial severance. If the government intends to offer a confession against one defendant which incriminates a co-defendant, the co-defendant is entitled to a separate trial to avoid the prejudice of not being able to cross-examine the declarant. Bruton, 391 U.S. at 136 (1968). However, such prejudice may be avoided by the redaction from the confession of any reference to the co-defendant. United States v. Kaminski, 692 F.2d 505, 522 (8th Cir. 1982).

In the present case, the undersigned is not aware of any statements made by co-defendants that incriminate defendant.[2] Based on the information available to the court at this time, the undersigned will recommend the Motion for Severance be denied. However, if there are such statements, if the government plans to use them, if they cannot be appropriately redacted, and the co-defendant making such statements is to be tried with defendant, the trial court may order severance. This information will not be completely known until immediately before the time of trial.

2. Motion of Defendant Hendrix to Suppress Evidence [179]
and
3. Motion of Defendant Hendrix to Suppress Statements [181]

The government filed a five paragraph statement notifying defendant Hendrix of the evidence to be presented at the Evidentiary Hearing. [273] Prior to the hearing, counsel for defendant stated that as to ¶3 and ¶5, defendant waived challenge.[3] Evidence was adduced as to the other three areas

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[2] In the final paragraph of the Motion for Severance, defendant requested the court to order the United States Attorney to deliver to the court for inspection *in camera* all statements of defendants and prospective witnesses for the government for the purpose of aiding the court in ruling on this Motion. The court declines to so order.

[3] ¶3 states Drug Enforcement Administration Special Agent Christian Ebner will testify to a narcotics buy by a DEA cooperator on 2/22/00. Defendant was provided the tapes of this transaction and counsel stated there were no legal issues to be raised. ¶5 states Special Agent David Turner will testify to the service of a search warrant at 10121 Crown Point on

of evidence: the execution of a search warrant at 2604 N. 22nd Street on 4/21/98; the arrest of defendant and 7/14/98 and the execution of a search warrant at 4045 Olive, Apt. F., on 8/16/2000.

At the Evidentiary Hearing, the government presented the testimony of DEA Special Agent Richard (Rick) Russell and St. Louis Metropolitan Police Department Police Officer Kimberly Haley. Defendant did not testify or present witnesses. Based on the testimony and evidence adduced and having had an opportunity to observe the demeanor and evaluate the credibility of the witnesses, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Search Warrant: 2604 N. 22nd Street, April 21, 1998

Police Officer Kim Haley, who is assigned to the Mobile Reserve Unit of the St. Louis Metropolitan Police Department, testified about the execution of a search warrant at 2604 N. 22nd Street on April 21, 1998. PO Haley received information from a reliable Confidential Informant ("CI") regarding defendant Hendrix and narcotics at his residence and as a result of that information, she applied for a search warrant for the residence. The Application describes the residence with particularity. Gov.Ex.3. The Affidavit in Support of the Application states PO Haley's credentials and further states that on April 15, 1998, she was contacted by a CI who had proven reliable in the past by providing her with information which had led to four arrests for drug violations. Of these four arrests, three individuals had been confined to the Missouri Department of Corrections and one case was currently pending in the circuit court system.

August 16, 2000. Counsel for defendant stated there were no legal issues to challenge with regard to this Search Warrant.

The CI told her that within the past twenty-four hours, he/she had the opportunity to be in the residence of a person he/she knew as Deron Hendrix, a black male in his twenties residing at 2604 N. 22nd Street on the second floor. The CI observed defendant Hendrix to be in possession of a large amount of cocaine and saw defendant Hendrix make three separate narcotics transactions to three separate individuals.

On April 20, 1998, she was re-contacted by the same informant who advised that he/she had just left the residence at 2604 N. 22nd Street. At that time, defendant Hendrix was in possession of a large quantity of cocaine. Between April 15 and April 20, 1998, she and other members of the Mobile Reserve Unit conducted periodic surveillances of the residence at 2604 N. 22nd Street, second floor. During these surveillances, the officers observed an unusual amount of pedestrian traffic enter and leave the residence. Based on this information, the Honorable Joan M. Burger signed a search warrant for 2604 N. 22nd Street, second floor on April 21, 1998. Later that day, officers set up surveillance of the residence and received information from the CI that defendant Hendrix was on his way home. PO Haley observed defendant pull up, driving a black Mazda pickup truck. He immediately drove away, possibly after seeing PO Haley and the other officers' marked cars parked near by. Approximately ten minutes later, defendant Hendrix returned and exited his vehicle. He was detained and informed of the search warrant. The officers knocked on the door, waited approximately thirty seconds and having heard no sounds from within, forced the door. The officers were aware that also living in the residence were defendant's brother, Delvare Hendrix, and the brother's girlfriend, John Ethel Jackson.

Defendant Hendrix was taken into the residence with the officers. They encountered Ms. Jackson who said the residence was hers. The residence was, in fact, leased to Ms. Jackson. They gave her a copy of the search warrant. There were two bedrooms in the apartment. In a closet in the

rear bedroom (not the master bedroom), the officers located men's clothing which Ms. Jackson said belonged to defendant. They also found a red duffle bag. From the duffle bag, officers seized a large brown paper bag containing twenty-four clear plastic bags of what was later determined to cocaine. They also seized from the duffle bag paper work including a vehicle renewal application for a 1991 Chevrolet tudor sent to Delvare Hendrix. Gov.Ex.4. On the application's envelope was the handwritten notation "Shane, This is yours." Gov.Ex.4. PO Haley was aware that Shane is defendant Hendrix's nickname. Ms. Jackson said she wrote on the envelope. However, it is not known who placed the envelope in the duffle bag.

Defendant Hendrix was placed under arrest and searched incident to the arrest. $336 and a set of keys were seized from his person. One of the keys fit the front door of the residence. PO Haley advised defendant of his Miranda rights by reading from the department issued card. The card from which she read states:

-You have the right to remain silent
-Anything you say can be used against you in court
-You have the right to talk to a lawyer for advice before we ask you any questions, and to have a lawyer with you during questioning
-If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
Do you understand?

Defendant said he understood his rights. He was not questioned at that time. At the police department, PO Haley advised defendant of his rights again in the same manner but again did not question him. Defendant volunteered "I don't give a fuck. I don't live there. That shit ain't mine."

B. Search Warrant: 4045 Olive, Apt. F, August 16, 2000

Special Agent Rick Russell testified about the execution of a search warrant at 4045 Olive, Apt. F[4]. On 8/16/00, he met with other agents for briefing and they proceeded as a team to the

[4] The Affidavit in Support of the Search Warrant was not introduced. The court is aware from previous hearings in this case that the approximate one hundred page

residence. Shortly after 6:00 a.m., SA Russell knocked on the door and announced who he was and his purpose there. A female subject identified as Angela Reed answered the door. SA Russell told Ms. Reed he was there to execute a Search Warrant and gave her documentary proof, specifically the Application with the attached list of items to be seized and the Search Warrant itself. Gov.Ex.1. The Application and Search Warrant were signed by the Honorable Lawrence O. Davis on 8/15/00. Defendant Hendrix was in the master bedroom, in bed, and he and Ms. Reed were placed in the living room where there was a TV for them to watch during the search. Defendant was handcuffed for the officers' safety. SA Russell told defendant he was not under arrest. Defendant was uncuffed upon completion of the search and remained in his home. The officers searched the residence and seized a pager, a cell phone, a personal organizer and various documents.

Outside the residence, parked by the back door, there was a green Corvette convertible which SA Russell believed belonged to defendant Hendrix. SA Russell asked defendant if he had a car. Defendant responded "yes" and identified the car as his. SA Russell asked permission to search the car and defendant said "No problem."[5] Defendant was presented a Department of Justice Consent to Search form which he signed in SA Russell's presence. This form states:

1. I HAVE BEEN ASKED TO PERMIT SPECIAL AGENTS OF THE DRUG ENFORCEMENT ADMINISTRATION TO SEARCH: (Describe the person, places or things to be searched.) [1 green in color Corvette. (778LGB).]

2. I HAVE NOT BEEN THREATENED NOR FORCED IN ANY WAY.

Affidavit was not introduced unless challenged by a motion to quash or a motion pursuant to Franks v. Delaware, 438 U.S. 152 (1978). No such challenge was made by defendant Hendrix.

[5] SA Ebner testified he believed the scope of the Search Warrant would have allowed him to search the car even without consent. He thought he recalled that the day before the execution of the warrant, he was briefed on this issue by AUSA Decker. What he believed is not relevant because defendant, in fact, consented to the search of the car.

3. I FREELY CONSENT TO THIS SEARCH.

The portion in brackets was handwritten. Gov.Ex.2. The car was searched and a personal organizer seized. A copy of the list of items seized from both the residence and the car were left with defendant and Ms. Reed.

C. Arrest and Seizure: July 14, 1998

In the evening hours of July 14, 1998, PO Haley and her partner Matt McDonough received information from a CI. PO Haley was aware of the identity of the CI, had worked with him/her before and knew the information provided by this CI had led to charges being filed. The CI said defendant Hendrix was parked east-bound on the south side of Hebert in his red Chevrolet Blazer and had crack cocaine and marijuana in his possession. The CI said the narcotics were in a purple and yellow Royal Crown bag in defendant's pocket. The CI described defendant's clothing.

The officers had seen defendant Hendrix's car before and were familiar with it. They also knew that co-defendants, the Dilworth brothers, and Hendrix family members lived in flats on Hebert next to each other. The officers believed the Dilworths and Hendrix families might have been related but knew they were involved in narcotics activity together.

The officers responded to the 2900 block of Hebert and saw defendant's red Blazer. Defendant was sitting in the driver's seat. There was an African American passenger.

The officers pulled up and approached the vehicle. Both officers went to the driver's side door and PO McDonough asked defendant to get out for an interview. When defendant exited the car, PO McDonough observed a bulge in defendant Hendrix's pants pocket and the string of the Crown Royal bag hanging out of defendant's pocket. Defendant had on white pants with blue pinstripes, resembling baseball players' pants. PO McDonough patted defendant down for safety and took a Crown Royal bag from his pocket. Inside the bag was 7.87 grams of what later was

determined to be crack cocaine and five dime bags of a substance later determined to be marijuana.

PO McDonough placed defendant under arrest and read him his Miranda rights from the police department card as set out above. He asked if defendant understood and defendant said "yes". Neither officer questioned defendant but defendant volunteered a statement to the effect that the officers had just put the dope on him like they did before.

On cross examination, counsel questioned PO Haley at length about defendant's pants and introduced as defendant's Exhibit A a pair of white and blue pinstriped baseball pants. Counsel's point was that baseball pants do not have pockets. PO Haley testified that the pants (Def.Ex.A) were similar but could not be the defendant's pants worn on July 14, 1998. The officers did not seize defendant's pants at the time of his arrest but PO Haley acknowledged that they should have seized them. PO Haley observed the pat down by PO McDonough and was unable to tell whether PO McDonough manipulated the pocket. However, the cord was clearly visible as was the bulge, because defendant's pants were tight. PO McDonough's report indicates he felt something hard.

CONCLUSIONS OF LAW

At the conclusion of the Evidentiary Hearing, counsel for defendant requested and was granted time to brief the issues raised. Defendant filed a Memorandum of Law in Support of Defendant's Motion to Suppress Evidence [284] and the government responded [285].

A. Search Warrant: 2604 N. 22nd Street

1. Probable Cause

Search warrants to be valid must be based on a finding by a neutral detached judicial officer that there is probable cause to believe that evidence, instrumentalities or fruits of a crime, contraband or a person for whose arrest there is probable cause may be found in the place to be searched.

Johnson v. United States, 333 U.S. 10 (1948); Warden v. Hayden, 387 U.S. 294 (1967); Fed.R.Crim.P. 41. The standard of probable cause for the issuing judge is whether, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause is "a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Gates, 462 U.S. at 232. Applications and affidavits should be read with common sense and not in a grudging, hypertechnical fashion. United States v. Ventresca, 380 U.S. 102, 109 (1965). Information contained in applications and affidavits for search warrants must be examined in the totality of the circumstances presented. Gates, 462 U.S. at 230. The duty of the reviewing judge "is simply to ensure that the [issuing judge] had a `substantial basis for . . . conclud[ing]' that probable cause existed." Gates, 462 U.S. at 238-39, quoting Jones v. United States, 362 U.S. 257, 271 (1960). Once a judicial officer has issued a warrant upon a finding of probable cause, that finding deserves great deference. Gates, 462 U.S. at 236. The affidavit presented in the instant case clearly contains the "fair probability" that evidence, instrumentalities or fruits of a crime or contraband would be found at the address indicated. The facts set out above show that there was a substantial basis for concluding that probable cause existed.

2. Knock and Announce

The officers knocked on the door of 2604 N. 22nd Street, announced their presence and purpose and waited approximately thirty seconds. Hearing no response or sounds from inside, they forced the door. 18 U.S.C. § 3109 provides in part that an officer may break into a house to execute a search warrant "if, after notice of his authority and purpose, he is refused admittance." The defendant bears the burden of establishing a prima facie case when asserting a § 3109 claim. United States v. Schenk, 983 F.2d 876, 878 (8th Cir. 1993) (quoting United States v. Mueller, 902 F.2d 336,

344 (5th Cir. 1990) (citation omitted)); United States v. DiCesare, 765 F.2d 890, 896 (9th Cir. 1985). There is no hard-and-fast time limit that the officers must wait after announcing their presence and purpose before entering the residence. Schenk, 983 F.2d at 879; United States v. Streeter, 907 F.2d 781, 789 (8th Cir. 1990), overruled on other grounds, United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992) (en banc). However, a "failure to answer a knock and announcement has long been equated with a refusal to admit the search party and a justification for forcible entry." United States v. Ramos, 923 F.2d 1346, 1356 (9th Cir. 1991), quoted with approval in Schenk, 983 F.2d at 879.

It is true that a very brief time cannot be equated with a refusal of admittance. See, e.g., United States v. Marts, 986 F.2d 1216, 1217 (8th Cir. 1993) (refusal cannot be inferred *merely* from the lapse of less than five seconds). However, twenty and twenty-five to sixty seconds have been found to be permissible to raise the inference of refusal of admittance. United States v. Lucht, 18 F.3d 541, 549 (8th Cir.), cert. denied, 513 U.S. 949 (1994). There was no violation of the knock and announce rule.

3. Defendant's Arrest

After finding the brown paper bag containing twenty-four clear plastic bags of cocaine in the red duffle bag in the closet of the bedroom, identified as containing defendant's belongings, the officers placed defendant under arrest.

Law enforcement officers may arrest a person without a warrant if they have probable cause to believe that the person has committed or was committing a crime. Gerstein v. Pugh, 420 U.S. 103 (1975); United States v. Watson, 423 U.S. 411 (1976). Probable cause for arrest exists if at the time of the arrest the facts and circumstances within the knowledge of the officers and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the person had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (1964). See

also R.S.Mo § 544.216 (a municipal law enforcement officer may arrest on view without a warrant any person about whom he has reasonable grounds to believe has violated any law of this state).

The proper standard for determining whether probable cause exists is whether the arresting officer reasonably believes an individual has committed or is committing a crime. United States v. Durile Lee Brown, 49 F.3d 1346 (8th Cir. 1995). More specifically

> [i]n determining whether probable cause exists to make a warrantless arrest a court will consider whether the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed . . . an offense. Probable cause is to be assessed in terms of the circumstances confronting a reasonably cautious police officer at the time of the arrest, and the arresting officer is entitled to consider the circumstances, including arguably innocent conduct, in light of his training and experience. "[T]he probability, and not the *prima facie* showing, of criminal activity is the standard of probable cause."

Hannah v. City of Overland, MO, 795 F.2d 1385, 1389 (8th Cir. 1986) (quoting United States v. Wallraff, 705 F.2d 980, 990 (8th Cir. 1983)).

Here, the officers had information from a reliable CI that defendant had, on at least two recent occasions, a large amount of cocaine in his possession. The CI saw defendant make three separate narcotics transactions to three individuals. A key issue in determining whether information provided by a confidential informant is sufficient to establish probable cause is whether that information is reliable.

> An informant may establish the reliability of his information by establishing a track record of providing accurate information. Illinois v. Gates, 462 U.S. 213, 233 (1983). However, where a previously unknown informant provides information, the informant's lack of a track record requires "some independent verification" to establish the reliability of the information. United States v. Robertson, 39 F.3d 891, 893 (8th Cir. 1994) [cert. denied, 514 U.S. 1090, (1995)]. Independent verification occurs when the information (or aspects of it) is corroborated by the independent observations of police officers. Gates, 462 U.S. at 241-45; Draper v. United States, 358 U.S. 307, 313 (1959); United States v. Morales, 923 F.2d 621, 625 (8th Cir. 1991).

United States v. Brown, 49 F.3d 1346, 1349 (8th Cir. 1995).

Here, the CI was considered reliable, having provided information in the past leading to charges and cases against others. However, the officers corroborated this information by periodic surveillance and observed an unusual amount of pedestrian traffic enter and leave the residence. They found cocaine in a duffle bag in a closet identified as belonging to defendant and in the bag was paperwork tying the bag and its contents to defendant. Clearly, the officers had probable cause to arrest defendant after the discovery of the cocaine.

Defendant argues in his brief that there is insufficient nexus between defendant and the narcotics. He argues defendant did not have actual or constructive possession of the drugs and the statements of Ms. Jackson regarding the use of the bedroom, ownership of the men's clothing and the renewal application envelope were self-serving in that her statements deflect attention away from her boyfriend. The court finds that while these arguments may persuade a jury and/or ultimately the trial judge of the insufficiency of the evidence at trial, during a Motion to Suppress, the issue is not the sufficiency of the evidence but whether there was a violation of the Fourth Amendment by law enforcement officials.[6] The court finds that all requirements of applying for, obtaining and executing a search warrant were followed and the evidence seized should not be suppressed.

4. Search Incident

The search of defendant's person was lawful because it was incident to his lawful arrest. Chimel v. California, 395 U.S. 752, 763 (1969); United States v. Robinson, 414 U.S. 218, 235 (1973); New York v. Belton, 453 U.S. 454 (1981). Therefore, the items found on defendant's person should not be suppressed.

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[6] The case cited by defendant, United States v. Brown, 3 F.3d 673 (3rd Cir. 1993) is a case in which the Court of Appeals was reviewing the jury verdict for sufficiency of evidence. Id. at 680.

5. Statement

After defendant was arrested, he was read his Miranda rights twice as set out in the Findings of Fact above. Defendant volunteered an exculpatory statement not in response to questioning by the officers.

A defendant may knowingly and intelligently waive his rights and agree to answer questions. Miranda v. Arizona, 384 U.S. 436, 479. When the prosecution seeks to introduce in evidence a statement made by a defendant while in custody, it has the burden of showing by a preponderance of the evidence that the statement was made after a voluntary, knowing and intelligent waiver of the Miranda rights by the defendant. Colorado v. Connelly, 479 U.S. 157 (1986). "The requirement that Miranda warnings be given does not, of course, dispense with the voluntariness inquiry" Dickerson v. United States, 530 U.S. 428, 444 (2000). The court must look to the totality of the circumstances surrounding the interrogation to determine whether the waiver was the product of a free and deliberate choice, rather than intimidation, coercion, or deception; and whether the waiver was made with an awareness of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412 (1986).

The statement must be voluntary and not the product of any police conduct by which the defendant's will is overborne. Haynes v. Washington, 373 U.S. 503 (1963); Colorado v. Connelly, 479 U.S. at 170. However, as the Supreme Court stated in Berkemer v. McCarthy, 468 U.S. 420 (1984), "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of Miranda are rare." Id. at 433 n. 20; Dickerson, 530 U.S. at 444. Here, defendant was advised of his Miranda rights twice, and he volunteered the statement not in response to questioning. This is not the rare case referred to in Dickerson, 530 U.S. at 444. His statement should not be suppressed.

B. Search Warrant: 4045 Olive, Apt. F

1. Execution of the Search Warrant

In defendant's brief he does not address this Search Warrant. Apparently, he does not challenge it. The law regarding search warrants set out above applies to this search warrant. There are no legal issues requiring further discussion regarding the search of this residence. There was no violation of the Fourth Amendment in the execution of this search warrant and the items seized should not be suppressed.

2. Consent to Search the Green Corvette

Persons may give up their Fourth Amendment rights by consenting to a search. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Such consent must be given freely and voluntarily. Id. In determining whether a consent to search was given freely and voluntarily, the court must examine the totality of the circumstances under which it is given. United States v. Mendenhall, 446 U.S. 544, 557 (1980); United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990); United States v. Lee, 886 F.2d 998, 1000 (8th Cir. 1989), cert. denied, 493 U.S. 1032 (1990). Consent to search may be given by the criminal suspect or by some other person who has common authority over the premises or item to be searched. United States v. Matlock, 415 U.S. 164, 171 (1974); United States v. Bradley, 869 F.2d 417, 419 (8th Cir. 1989). A search may be valid when based on the consent of a party whom the police reasonably believe to have authority to consent to the search even if it is later determined that the party did not in fact have such authority. Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 2800 (1990).

Here, defendant orally consented to a search of the Corvette and then signed a Consent to Search form as set out in the Findings of Fact above. There is no evidence before the court that defendant's consent was not voluntary. The burden is on the government to show that the consent

was voluntary under the totality of the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). There are numerous factors a court should consider in determining whether consent was freely and voluntarily given. United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990). In Chaidez, the Eighth Circuit noted that:

> courts should ask whether the person who consented: (1) was detained and questioned for a long or short time, . . . (2) was threatened, physically intimidated, or punished by the police, . . . (3) relied on promises or misrepresentations made by the police, . . . (4) was in custody or under arrest when the consent was given, . . . (5) was in a public or secluded place, . . . or (6) either objected to the search or stood by silently while the search occurred.

Id. at 381 (citations omitted). Here, defendant was only detained for the brief period of the search. There is no evidence of physical threats, intimidation or punishment. There is no evidence of promises or misrepresentations to induce defendant to consent. Defendant was not in custody, was in his own home and did not object to the search. The items seized from the Corvette should not be suppressed.

C. Arrest and Seizure: July 14, 1998

1. Approach and Pat Down

Based on information from a CI that the officers knew to be reliable, they responded to the location and saw defendant sitting in his red Blazer, all as described by the CI. They approached the vehicle and asked defendant to get out. Police officers may approach an individual in a public place to ask if the person is willing to answer questions, and the officers may put questions to the person if he is willing to answer. Florida v. Royer, 460 U.S. 491, 497 (1983). Such encounters do not infringe upon any Fourth Amendment rights, and do not, therefore, require any degree of suspicion. Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984). Officers need "no basis for suspecting a particular

individual [to] ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage--as long as the police do not convey a message that compliance with their requests is required." Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 2386 (1991) (citations omitted). The officers properly approached defendant and asked him to get out of his vehicle. However, such encounters may escalate and become seizure of the person within the meaning of the Fourth Amendment and, thus, must be supported by some reasonable, articulable suspicion that the person is engaged in criminal activity. See Terry v. Ohio, 392 U.S. 1, 9-10 (1968). Knowing the information given by the CI and upon seeing the Crown Royal string hanging out of defendant's pants and seeing a bulge there, the officers had reasonable suspicion that defendant might be up to some criminal activity.

Police officers may briefly detain an individual for investigative purposes when they have reasonable suspicion that criminal activity is taking place. See Terry v. Ohio, 392 U.S. 1, 9-10 (1968); United States v. Thompkins, 998 F.2d 629, 633 (8th Cir. 1993); United States v. Horne, 4 F.3d 579, 588 (8th Cir. 1993). The police may frisk for weapons for their own safety. See Pennsylvania v. Mimms, 434 U.S. 106, 111-112 (1977).

PO McDonough patted defendant down for safety. He felt no weapon. However, he was not required to ignore the information he had previously been given or his own observations: he had been told that defendant had narcotics in a Crown Royal bag which he kept in his pocket and he saw that a Crown Royal string was hanging out of defendant's pocket and that there was a bulge in the pocket. PO McDonough clearly had probable cause sufficient to retrieve the bag from defendant's pocket.

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's

> search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minnesota v. Dickerson, 508 U.S. 366, 375-376 (1993). However, if the incriminating character of the object is not immediately apparent to the officer, the officer may not seize it. Id. at 379. "Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe the item is contraband before sizing it ensures against excessively speculative seizures." Id. at 376. Here, based on all the information available and the totality of the circumstances, the incriminating nature of the bulge was immediately apparent.

Defendant's brief argues that the "plain feel" doctrine should be applied.[7] However, here the issue is not whether PO McDonough "manipulated" the bulge but whether the bulge itself which felt "hard," together with the Crown Royal string hanging out and the other information from the CI already corroborated and the officer's observations and knowledge that defendant was in possession of narcotics found during the execution of a search warrant at his residence just three months before was sufficient probable cause to retrieve the bag. The court finds that PO McDonough had probable cause and the defendant's Fourth Amendment rights were not violated.[8] The drugs should not be suppressed.

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[7] The "plain feel" doctrine, articulated in Minnesota v. Dickerson, 508 U.S. 366 (1993) states that if an officer is lawfully conducting a pat down for weapons and feels an object, the "incriminating character" of which is "immediately apparent", Id. at 375, he has probable cause and may seize it. However if it requires something beyond the scope of Terry, that is, it requires "squeezing, sliding and otherwise manipulating the contents of a defendant's pocket" it is not permitted. Id. at 378.

[8] The issue of whether baseball pants have pockets goes to the credibility of the witnesses and the weight of the evidence at trial. PO Haley testified that the baseball pants introduced as defendant's Exhibit A were not the pants worn by defendant on July 14, 1998. The court finds this testimony credible.

2. Arrest

Upon finding the narcotics, defendant was arrested. As stated above, law enforcement officers may arrest a person without a warrant if they have probable cause to believe that the person has committed or was committing a crime. Gerstein v. Pugh, 420 U.S. 103 (1975); United States v. Watson, 423 U.S. 411 (1976). Probable cause for arrest exists if at the time of the arrest the facts and circumstances within the knowledge of the officers and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the person had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (1964). See also R.S.Mo § 544.216 (a municipal law enforcement officer may arrest on view without a warrant any person about whom he has reasonable grounds to believe has violated any law of this state). Defendant's arrest was lawful.

3. Statement

After being advised of his Miranda rights and indicating he understood, defendant made an exculpatory statement. As stated above, a defendant may knowingly and intelligently waive his rights and agree to answer questions. Miranda v. Arizona, 384 U.S. 436, 479. When the prosecution seeks to introduce in evidence a statement made by a defendant while in custody, it has the burden of showing by a preponderance of the evidence that the statement was made after a voluntary, knowing and intelligent waiver of the Miranda rights by the defendant. Colorado v. Connelly, 479 U.S. 157 (1986). "The requirement that Miranda warnings be given does not, of course, dispense with the voluntariness inquiry" Dickerson v. United States, 530 U.S. 428, 444 (2000). The court must look to the totality of the circumstances surrounding the interrogation to determine whether the waiver was the product of a free and deliberate choice, rather than intimidation, coercion, or deception; and whether the waiver was made with an awareness of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412 (1986).

The statement must be voluntary and not the product of any police conduct by which the defendant's will is overborne. Haynes v. Washington, 373 U.S. 503 (1963); Colorado v. Connelly, 479 U.S. at 170. However, as the Supreme Court stated in Berkemer v. McCarthy, 468 U.S. 420 (1984), "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of Miranda are rare." Id. at 433 n. 20; Dickerson, 530 U.S. at 444. Defendant's volunteered, exculpatory statement should not be suppressed.

ACCORDINGLY,

IT IS HEREBY ORDERED that defendant Hendrix's Motion to Compel Disclosure of Existence and Substantial Promises of Immunity, Leniency or Preferential Treatment is **DENIED** as moot. [183]

IT IS FURTHER ORDERED that defendant Hendrix's Motion to Interview Prospective Government Witnesses is **DENIED** as moot. [184]

IT IS HEREBY RECOMMENDED that defendant Hendrix's Motion to Suppress Identification be **DENIED** as moot. [182]

IT IS FURTHER RECOMMENDED that defendant Hendrix's Motion to Suppress Evidence be **DENIED**. [179]

IT IS FURTHER RECOMMENDED that defendant Hendrix's Motion to Suppress Statements be **DENIED.** [181]

IT IS FURTHER RECOMMENDED that defendant Hendrix's Motion for Severance from Co-defendants at Trial be **DENIED**. [185]

The parties are advised that they have eleven (11) days in which to file written objections to this report and recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for

good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).

/s/_____
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

Dated this _____ day of September, 2001.